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No. 83-1632

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARPER & ROW, PUBLISHERS, INC. AND
THE READER'S DIGEST ASSOCIATION, INC.,
Petitioners,

—v.—

NATION ENTERPRISES AND THE NATION ASSOCIATES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

Whether the United States Court of Appeals for the Second Circuit correctly applied long established principles of copyright law to the facts of this case?

Parties Below

The parties to the proceedings below were Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc., plaintiffs, and Nation Enterprises and The Nation Associates, Inc., defendants.*

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* As required by Supreme Court Rule 28.1, Nation Enterprises and The Nation Associates, Inc. ("The Nation") advise the Court that they have no parent companies and no subsidiaries. The Nation Institute is an affiliate company of The Nation Associates.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Parties Below	ii
Table of Authorities	iv
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Statement of Facts	2
A Time To Heal	2
The Nation Article	3
Summary of Argument	4
ARGUMENT	5
I. In Determining That Much of What H&R Claim The Nation Copied was Noncopyrightable, the Second Circuit Applied Long Established Law That Does Not Conflict with Rulings in Any Other Circuit	5
II. The Second Circuit's Fair Use Analysis Was in Conformity with the Statute and the Case Law	10
CONCLUSION	14

TABLE OF AUTHORITIES

Cases PAGE

American Code Co. v. *Bensinger*, 282 F. 829 (2d Cir. 1922) 5n

Baker v. *Selden*, 101 U.S. 99 (1879) 5n

Eisenschiml v. *Fawcett Publications, Inc.*, 246 F.2d 598 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957)..... 6n

Flick-Reedy Corp. v. *Hydro-Line Manufacturing Co.*, 351 F.2d 546 (7th Cir. 1965) 8

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)..... 11

Greenbie v. *Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957) ... 5n

Hoehling v. *Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) 7, 7n, 8

Iowa State University Research Foundation, Inc. v. *American Broadcasting Cos.*, 621 F.2d 57 (2d Cir. 1980) 10-11

MCA, Inc. v. *Wilson*, 677 F.2d 180 (2d Cir. 1981) 11

Meredith Corp. v. *Harper & Row, Publishers, Inc.*, 500 F.2d 1221 (2d Cir. 1974) (*per curiam*), *aff'g* 378 F. Supp. 686 (S.D.N.Y. 1974) 9n

Meredith Corp. v. *Harper & Row, Publishers, Inc.*, 413 F. Supp. 385 (S.D.N.Y. 1975) 9n

Miller v. *Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981).....5n, 6n, 8

Pillsbury Co. v. *Milky Way Productions, Inc.*, 215 U.S.P.Q. 124 (N.D. Ga. 1981) 11

Public Affairs Associates, Inc. v. *Rickover*, 369 U.S. 111 (1962) (*per curiam*), *on remand*, 268 F. Supp. 444 (D.D.C. 1967) 5n

PAGE

Rokeach v. *Avco Embassy Pictures Corp.*, 197 U.S.P.Q. 155 (S.D.N.Y. 1978) 5n

Rosemont Enterprises, Inc. v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) 7n, 8, 11

Sid & Marty Krofft Television Productions, Inc. v. *McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977).... 9

Sony Corp. of America v. *Universal City Studios, Inc.* 104 S. Ct. 774 (1984) 11-12, 12n

Suid v. *Newsweek Magazine*, 503 F. Supp. 146 (D.D.C. 1980) 5n

Triangle Publications, Inc. v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980)..... 9

United States v. *Hamilton*, 583 F.2d 448 (9th Cir. 1978) 6n

Wagner v. *Meccano Ltd.*, 246 F. 603 (6th Cir. 1917), *aff'g in part* 234 F. 912 (S.D. Ohio 1916)..... 8

Wainwright Securities, Inc. v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) 6n, 11

W.H. Anderson Co. v. *Baldwin Law Publishing Co.*, 27 F.2d 82 (6th Cir. 1928) 8-9

Zacchini v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)..... 9

Congressional Documents

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659 5n

S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975) 13

Constitutional Provision

U.S. Const. amend. I..... 9

PAGE

Statutes

Copyright Revision Act of 1976

17 U.S.C. §§ 101 *et seq.* (1982) ..... *passim*

17 U.S.C. § 102 (1982)..... 5n

17 U.S.C. § 106 (1982).....5n, 12

17 U.S.C. § 107 (1982) 10, 12, 13

Treatises

1 M. Nimmer, *Nimmer on Copyright* (1983) 8, 9

3 M. Nimmer, *Nimmer on Copyright* (1983) 12-13

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set out in the Petition (Pet. at 2),[1] respondents Nation Enterprises and The Nation Associates, Inc. ("The Nation") have annexed to this brief additional statutory provisions also involved in this action.

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1 The following abbreviations will be used in this brief: "Pet." for citation to the Petition for a Writ of Certiorari, "Pet. App." for citation to the Appendix to the Petition, and, for example, "Tr. A-329" or "Pl. Ex. 6, El5" for citation to the joint appendix below.

STATEMENT OF THE CASE

On April 7, 1979, The Nation published a short news article reporting on information contained in former President Gerald R. Ford's forthcoming memoirs, the exclusive publication rights to which were owned by Harper & Row and Reader's Digest (hereinafter referred to as "H&R"). H&R filed suit, which Mr. Ford did not join, against The Nation in February, 1980 for $12,500. The complaint contained one count of copyright infringement under the Copyright Revision Act of 1976, 17 U.S.C. §§ 101, *et seq.* (1982), and three state law counts.[2] After a trial to the court, the district court held The Nation had infringed H&R's copyright and was liable for $12,500 in damages.

The Nation appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit, with one judge dissenting, reversed the district court. The court held that much of the material that H&R claimed had been copied in violation of their copyright was not copyrightable because that material was fact, was in the public domain, or was not original to the author. The court then held that The Nation's use of the material that was copyrightable was fair. A petition for *en banc* reconsideration was denied.

STATEMENT OF FACTS

A Time to Heal

In the spring of 1979, H&R jointly published *A Time to Heal: The Autobiography of Gerald R. Ford* (the "memoirs"). (Pet. App. at A-5; Tr. A-229) The book, as H&R perceived it, was to contain "significant hitherto unpublished material about (1) Mr. Ford's relationship with former President Nixon [and] (2) the circumstances and reasoning surrounding the

2 H&R cross-appealed from the district court's ruling that these counts were preempted. The Court of Appeals affirmed that ruling (Pet. App. at A-9 to A-14), and H&R have abandoned that issue in their Petition to this Court.

pardon of Mr. Nixon by Mr. Ford." (Pet. App. at A-5; Pl. Ex. 5, E530) To protect against uncompensated disclosure of such information, H&R's contract with former President Ford provided that, prior to publication, Mr. Ford would not reveal "information" about his presidency that he planned to disclose in the book. (Pet. App. at A-5; Pl. Ex. 6 ¶ 20(b), E551) Mr. Ford testified that he consequently refused to discuss publicly aspects of his presidency relating to his pardon of former President Nixon. (Pet. App. at A-5; Pl. Ex. 14, E654, E656-58)

On March 14, 1979, H&R sold first serial rights—the exclusive right to publish excerpts from the book prior to the book's publication—to *Time* magazine. (Pet. App. at A-5; Pl. Ex. 9, E565) *Time*'s license entitled it to publish in its April 23, 1979 issue approximately 7,500 words from Chapters One and Three of *A Time to Heal*; for that right *Time* agreed to pay to H&R $12,500 on signing the contract and $12,500 on April 16, 1979, the date on which *Time*'s April 23rd issue would be on sale. (Pet. App. at A-5; Pl. Ex. 9, E565-66) In the event that material from the two chapters was published in some other medium prior to *Time*'s use, the contract authorized a renegotiation of the amount of the second payment. (Pl. Ex. 9 ¶ 6(a), E566)

The Nation Article

Early in April, 1979, a copy of the 655 page, 200,000 word manuscript of *A Time to Heal* was provided to Victor Navasky, editor of The Nation. (Pet. App. A-6; Tr. A528) It is undisputed that the manuscript was not sought; it was not paid for; indeed, The Nation had had no prior connection of any sort with the book. (Pet. App. at A-6; Tr. A529)

The Nation published its 2,250 word article, entitled "The Ford Memoirs: Behind the Nixon Pardon," in its April 7, 1979 issue. (Pet. App. at A-6; Pl. Ex. 10, E569) Mr. Navasky had consulted with The Nation's counsel before publication and had been given a "green light" to publish under the fair use provisions of the Copyright Act. (Pet. App. at A-6; Tr. A561-64)

As its title suggests, The Nation's article centered about President Ford's pardon of former President Nixon. The article also reported other newsworthy information from the book not relating to the pardon; none of that information (including, *inter alia*, information about President Ford's retention of Henry Kissinger as Secretary of State and Mr. Ford's consideration of Ronald Reagan as his 1976 running mate) had been revealed to the public before. (Tr. A689-92)

On April 3, 1979, *Time* magazine's managing editor read The Nation article and called H&R to request that *Time* be permitted to publish its excerpts from President Ford's book one week earlier than the date provided for in the contract. (Pet. App. at A-8; Tr. A231-34) H&R refused *Time*'s request to publish one week early (Pet. App. at A-8; Pl. Ex. 31b, E827), thus leading *Time* not to print the excerpts from *A Time to Heal* and not to make the second $12,500 payment. (Tr. A245; Pl. Ex. 31b, E827) This action followed.

SUMMARY OF ARGUMENT

In one sense, this case arises out of facts unprecedented in this nation's history. The pardoning of one President by his successor was unique; that the successor had been chosen by the individual whom he pardoned made and makes the events of a decade ago matters of extraordinary public moment.

But if the roots of this action lie in momentous and unprecedented affairs of state, the decision of the Second Circuit in H&R's copyright action against The Nation rests firmly on a series of well-established and hardly controversial propositions of copyright law. H&R's challenge to the judgment of the Court of Appeals is based upon a misreading of the opinion of the Second Circuit and a misstatement of the law of other circuits so as to concoct a non-existent conflict among the circuits. There is no conflict among the circuits concerning the noncopyrightability of facts. There is no conflict among the

circuits as to the noncopyrightability of material already in the public domain or not original to an author. Most of the issues raised by H&R amount to nothing more than a disagreement with the application of those principles to the facts of this case. Nor did the Second Circuit's legal analysis of the fair use factors differ from that of this Court or other courts; all that differs is the facts of the cases to which those principles have been applied.

The decision of the Second Circuit is consistent with long established law and presents no occasion for review by this Court.

ARGUMENT

I.

IN DETERMINING THAT MUCH OF WHAT H&R CLAIM THE NATION COPIED WAS NONCOPYRIGHTABLE, THE SECOND CIRCUIT APPLIED LONG ESTABLISHED LAW THAT DOES NOT CONFLICT WITH RULINGS IN ANY OTHER CIRCUIT

The Second Circuit first reviewed The Nation article to determine to what extent the material H&R claimed had been copied was subject to copyright protection in the first place. In so doing, the court followed a long line of cases that have held that facts, material in the public domain, and material not original to an author are not copyrightable[3] and that copyright liability consequently cannot flow from publishing such material. (Pet. App. at A-14 to A-18) Adhering to the guidelines in the case law that distinguish between fact and expression, the

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3 *E.g.*, 17 U.S.C. §§ 102(a), 106(b) (1982); *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111 (1962) (*per curiam*), *on remand*, 268 F. Supp. 444, 448 (D.D.C. 1967); *Baker* v. *Selden*, 101 U.S. 99, 103 (1879); *Miller* v. *Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981); *American Code Co.* v. *Bensinger*, 282 F. 829, 834 (2d Cir. 1922); *Suid* v. *Newsweek Magazine*, 503 F. Supp. 146, 147 (D.D.C. 1980); *Greenbie* v. *Noble*, 151 F. Supp. 45, 65 (S.D.N.Y. 1957); *Rokeach* v. *Avco Embassy Pictures Corp.*, 197 U.S.P.Q. 155, 161 (S.D.N.Y. 1978); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5670.

Second Circuit first concluded that, in addition to an author's language, protectable expression "exists, in part, in [an author's] overall arrangement of facts" and in the "structure he chooses for the work as a whole." (Pet. App. at A-16) Applying that principle of law to the facts of this case, the Second Circuit concluded that: "In this case, there can be no concern that this mode of expression was usurped; The Nation article drew only upon scattered parts and not the total entity with its unique and protected mosaic." (Pet. App. at A-16)

Since H&R hardly can claim to differ with the very proposition of law the cases they cite set forth,[4] *i.e.*, that the arrangement of materials is sometimes protected by copyright law, it is plain that H&R's core difference with the Court of Appeals is with the court's application of that proposition to the facts of this case. But disagreement—if any seriously may be said to exist—as to whether The Nation's brief article possibly may be said to have appropriated the "arrangement" and "totality" of the entirety of the memoirs is hardly an issue worthy of this Court's consideration.[5]

In apparent recognition of this, H&R urge that a phrase used by the Court of Appeals with respect to the nature of "expression" as opposed to "information" is inconsistent with previous decisions. (Pet. at 10-12) When material concerns news and history, the court observed, courts have "carefully con-

4 *See, e.g., Miller* v. *Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981); *United States* v. *Hamilton*, 583 F.2d 448, 450 (9th Cir. 1978); *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Eisenschiml* v. *Fawcett Publications, Inc.*, 246 F.2d 598, 603 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957).

5 That the Second Circuit was correct in so holding is perhaps best illustrated by the citation in plaintiffs' Exhibit 11 (Pet. App. at E-5 to E-41) of pages in the manuscript that H&R claim correspond to consecutive sections of The Nation article. Those pages are: 607-08, 451, 44, 456, 1, 2-3, 48, 7, 4-5, 5, 5-6, 8, 14, 15, 16, 16, 18, 17, 21, 266, 55, 246, 248, 249, 238-39, 239, 243, 245, 246, 250, 250-51, 251, 252, 253, 254, 256, 298, 299, 46, 494, 537, 155-56, 216, 415, 416, 416, 53-54, 57.

fined that troublesome concept 'expression' to its barest elements—the ordering and choice of the words themselves." (Pet. App. at A-19) That this previously has been held to be the law in the Second Circuit cannot be denied. The very case cited by the Court of Appeals, *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980), so states.[6] Nor has that proposition been denied in other cases, including each and every case relied upon by H&R. (*See* Pet. at 11-12) For present purposes, it should suffice to say that the decision of the Court of Appeals as to copyrightability is grounded in the least controversial and most clearly established of all propositions of copyright law: facts may not receive copyright protection.

H&R's contention that the Second Circuit erred in concluding that "fact coupled with expression cannot constitute a copyrightable totality" (Pet. at 13) is based upon a mischaracterization of the opinion. The district court had refused to engage in any analysis whatsoever of whether The Nation had copied material that was copyrightable by H&R, reasoning that the facts set forth in the book "collected together with Ford's reflections" made up a "totality" protected by the copyright laws. The Second Circuit correctly held that those passages in the article that contained expression should be analyzed under the fair use doctrine.[7] The Second Circuit rejected the district court's conclusion that the presence of copyrightable "reflections" somehow could transform noncopyrightable fact into copyrightable expression. (Pet. App. at A-17) In doing so, the Second Circuit did no more than follow settled law, law cited

6 H&R's treatment of *Hoehling*, like its treatment of other cases relied upon by the Second Circuit that belie H&R's claim that the opinion below is inconsistent with earlier rulings, is to ignore it. (*See* Pet. App. at A-21, 27, 30) *See also Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). (*See* Pet. App. at A-15, 26-27)

7 Each of the examples of quotations by The Nation of language from the memoirs cited by H&R in their Petition to this Court was so analyzed by the Court of Appeals. (*Compare* Pet. at 7-8 *with* Pet. App. at A-23)

by H&R themselves, to hold that the facts in former President Ford's book are not copyrightable.

Finally, H&R are simply incorrect in their statement that the Second Circuit held "that almost unlimited paraphrasing from a work of nonfiction is permissible, unless the copier has 'borrowed virtually an entire work.' " (Pet. at 10) What the Second Circuit did hold was that if "paraphrasing" means reporting facts revealed in a book without using the author's expression, then, indeed, paraphrasing does not violate any copyright rights held by the author. As the Second Circuit stated:

> "Here, *The Nation* drew on scattered pieces of information from different pages and different chapters, and then described that information in its own words." (Pet. App. at A-18)

This ruling is wholly consistent with prior rulings of the Second Circuit itself in *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980), and *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), and with rulings in other circuits, *see, e.g.*, *Miller* v. *Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981) ("[o]bviously, a fact does not originate with the author of a book describing the fact"); 1 M. Nimmer, *Nimmer on Copyright* § 2.11[A], at 2-158 (1983).

The purported conflict perceived by H&R between this portion of the Second Circuit's opinion and decisions of other courts is fanciful. In both *Flick-Reedy Corp.* v. *Hydro-Line Manufacturing Co.*, 351 F.2d 546 (7th Cir. 1965), and *Wagner* v. *Meccano Ltd.*, 246 F. 603 (6th Cir. 1917), *aff'g in part* 234 F. 912 (S.D. Ohio 1916) (Pet. at 14), the plaintiffs sued for infringement of a patent on machinery and of the copyright in an accompanying instruction manual. The courts in both cases found for the plaintiffs because the defendants had copied the entirety of the plaintiffs' manuals, with minor alterations, and had passed off the manuals as their own. Similarly, in *W.H.*

Anderson Co. v. *Baldwin Law Publishing Co.*, 27 F.2d 82, 86-87 (6th Cir. 1928), the court found that the defendant had used the plaintiff's entire annotated Code of Ohio to create a different annotated Code. The court concluded that both "literary expression" and the structure of plaintiff's work had been copied. *See* 127 F.2d at 86-89.[8]

In two of the three questions H&R urge are presented by this case, and throughout their brief, H&R repeatedly attempt to transform this unremarkable application of long standing legal doctrine into a clash between First Amendment principles and copyright law. (Pet. at 9-10, 15-17) The opinion of the Second Circuit, however, simply does not exhibit such a conflict. It has long been accepted that the fact/expression distinction is one of the mechanisms by which First Amendment concerns are accommodated within the law of copyright. 1 M. Nimmer, *Nimmer on Copyright* § 1.10[B], at 1-72-78; *see Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n.13 (1977); *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1179 n.2 (5th Cir. 1980) (Brown, J., concurring in part); *Sid & Marty Krofft Television Productions, Inc.* v. *McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977). For the Court of Appeals so to rule was to avoid a potential clash with First Amendment principles, not to create one.

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8 H&R's reliance on *Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 500 F.2d 1221 (2d Cir. 1974) *(per curiam), aff'g* 378 F. Supp. 686 (S.D.N.Y. 1974) (Pet. at 15), is perplexing. *Meredith* was cited by the Second Circuit as an example of a case in which the entire structure of a book had been taken. (Pet. App. at A-16) In *Meredith*, the defendant purposefully took the plaintiffs' book "to serve as the content model [for its child psychology textbook] 'in terms of topics to be included, weighting of topics, and sequencing of topics.' " 378 F. Supp. at 687. In a later opinion granting a permanent injunction, the court held that the copying affected "the entire text and not just the eleven percent admittedly infringed." 413 F. Supp. at 387. Nothing of the sort has ever been alleged in this action.

II.

THE SECOND CIRCUIT'S FAIR USE ANALYSIS WAS IN CONFORMITY WITH THE STATUTE AND THE CASE LAW

H&R advance essentially two complaints about the Second Circuit's fair use analysis—that The Nation article did not contribute sufficiently to society or was not sufficiently productive to justify the invocation of the privilege of fair use (Pet. at 18-22), and that the unpublished nature of the memoirs should have prevented application of the fair use doctrine. (Pet. at 22-23) Neither perceived deficiency withstands analysis; neither, in any event, is an adequate ground to lead this Court to review the decision.

H&R's first contention may be met briefly: the statute itself includes news reporting as a presumptively fair use. 17 U.S.C. § 107 (1982). A benefit to society is presumed to flow from that activity. The panel below was unanimous in holding that the district court's decision that the article was not news reporting was clearly erroneous. (Pet. App. at A-25, A-45)

H&R press their claim that, because former President Ford's book was scheduled to be published shortly, the article made no contribution. (Pet. at 19) That never has been the legal test for fair use. If it were, any news article about a book, whether published before or after the book was available to the public, could be said to constitute a copyright violation on the ground that the book itself could be read.

Nor was the Second Circuit incorrect in deciding that it was error for the district court to hold that, in order that a use be fair, news must be "hot" enough to overcome a copyright violation. (Pet. App. at B-8) If that were the law, courts would be obliged to enter the thicket of determining how much benefit publishing a particular article conferred on the public. The law has never required or encouraged courts to engage in such an inquiry. Courts may, of course, decide that a claim that the use involved "news reporting" is a pretext. *See, e.g., Iowa*

State University Research Foundation, Inc. v. *American Broadcasting Cos.*, 621 F.2d 57, 61 (2d Cir. 1980); *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91, 96-97 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). The Second Circuit decided that the claim of news reporting in this action was not. (Pet. App. at A-25, 45)

The court below properly refrained from basing its decision upon its own subjective views of journalism: whether the journalism in The Nation article was "good" or, in the district court's revealing word, "poor" (Pet. App. at B-17), whether the article was necessary or superfluous. In accord with this view, courts have long eschewed determining the journalistic merit of a news article, the scholarly quality of a biography, and the like. *See Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 304, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *MCA, Inc.* v. *Wilson*, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., dissenting); *Pillsbury Co.* v. *Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981); *cf. Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

H&R misread this Court's decision in *Sony Corp. of America* v. *Universal City Studios, Inc.*, 104 S. Ct. 774 (1984), to support their contention that the article was a nonproductive use and that that factor should have been weighed in the fair use analysis. (Pet. at 21-23) As this Court well recalls, at issue in *Sony* was whether home videotaping was a productive use. *Id.* at 795 n.40, 807 (opinion of the Court per Stevens, J.; Blackmun, J., dissenting). The discussion in the dissent relied upon by H&R explicitly stated that news reporting was a presumptively productive use:

> "The situations in which fair use is most commonly recognized are listed in § 107 itself; fair use may be found when a work is used 'for purposes such as a criticism, comment, news reporting, teaching, scholarship, or research.' The House and Senate Reports expand on this list

somewhat,[9] and other examples may be found in the case law. *Each of these uses, however, reflects a common theme: each is a productive use*, resulting in some added benefit to the public beyond that produced by the first author's work." *Id.* at 807 (emphasis added, footnote omitted).

Unless H&R are seeking *sub silentio* to challenge the unanimous holding of the court below that the article was news reporting, they are simply wrong that either the timing or the quality of the article should have prevented the successful application of fair use in this case, much less that this provides an adequate basis on which to invoke this Court's power of review.

H&R's final contention—that the unpublished nature of the work should preclude or narrow the fair use defense (Pet. at 22-23)—is unsupported by any citation to any court and was rightly rejected by the Second Circuit. Section 106 of the Copyright Act recognizes the right to distribute copies of the work as one of the exclusive rights granted to the copyright holder. 17 U.S.C. § 106(3) (1982). Rights under section 106, however, are expressly made subject to the fair use limitations of section 107. H&R's statement, that prior to the passage of the Act fair use was not permitted in an unpublished work, is not accurate. (Pet. at 22) Professer Nimmer writes:

> "It was sometimes stated that the defense of fair use was not available in actions for common law copyright infringement . . . . However, there are no cases squarely so holding, while some expressly or by implication have denied this proposition. The doctrine of fair use was upheld and expressly applied in a common law copyright action in Hemingway v. Random House, Inc., 53 Misc.2d 462, 270 N.Y.S.2d 51 (Sup. Ct. 1967), *aff'd on other*

9 In a footnote, the dissent quoted from further examples given in the House and Senate Reports on this section, which include the following example: "summary of an address or article, with brief quotations, in a news report." *Id.* at 807 n.29.

> *grounds*, 23 N.Y.2d 341, 296 N.Y.S.2d 771 (1969)." 3 M. Nimmer, *Nimmer on Copyright* § 13.05, at 13-54.1 n.2 (1983) (citations omitted).

H&R quote from the Senate Report concerning section 107 to the effect that fair use should be limited in unpublished works. (Pet. at 23) What H&R neglect to note is the context in which this quotation appears. In the course of explaining that if a work is out of print, "the user may have more justification for reproducing it," the Report states that this presumption that a use is fair will not apply if the work is purposefully unpublished. S. Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1975). Because the Court of Appeals did not rely upon the unavailability of the memoirs as a factor in favor of a finding of fair use, this passage is not even relevant.

The Second Circuit's analysis of fair use was consistent with long-standing interpretations of the copyright laws. It provides no basis for plenary review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 5, 1984

SUPPLEMENTARY APPENDIX

Supplementary Appendix

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 102 of the Copyright Revision Act of 1976, 17 U.S.C. § 102 (1982), provides that:

> "(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> "(1) literary works;
>
> "(2) musical works, including any accompanying words;
>
> "(3) dramatic works, including any accompanying music;

"(4) pantomimes and choreographic works;

"(5) pictorial, graphic, and sculptural works;

"(6) motion pictures and other audiovisual works; and

"(7) sound recordings.

"(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

Section 106 of the Copyright Revision Act of 1976, 17 U.S.C. § 107 (1982), provides that:

"Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

"(1) to reproduce the copyrighted work in copies or phonorecords;

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

"(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."